NO. 21450

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK ARTHUR ROBERTS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On December 8, 1965, the Federal Grand Jury for the Southern District of California returned an indictment in one count against appellant Patrick Arthur Roberts and a codefendant, David Joseph Dimeglio. The indictment read as follows:

> "On or about November 24, 1965, the defendants DAVID JOSEPH DIMEGLIO and PATRICK ARTHUR ROBERTS transported a stolen 1966 Ford automobile, a motor vehicle, in interstate commerce to the State of Arizona

from Los Angeles County, California, in the Central Division of the Southern District of California, knowing said vehicle to have been stolen."

On January 10, 1966, defendant Dimeglio pleaded guilty to the offense charged and was sentenced to thirty months' confinement. Appellant pleaded not guilty to the offense charged on December 20, 1965, and his trial was set for January 24, 1966, later continued to January 31, 1966.

On January 31, 1966 a jury was impanelled to try appellant. On February 1, 1966, appellant waived further trial by jury, and a trial by the court was had on that day and on the following day, February 2, 1966, when appellant was found guilty of the offense charged by the court.

On March 21, 1966, appellant was sentenced to the custody of the Attorney General for a term of four years, to run concurrently with the State of California sentence which appellant was then serving. This Federal sentence was imposed pursuant to Title 18, United States Code, Section 2312.

Jurisdiction of the District Court was based on Title 18, United States Code, Section 2312, and on Title 18, United States Code, Section 3231.

Jurisdiction of this court is based on Title 28, United States Code, Sections 1291 and 1294(1).

II

STATUTES INVOLVED

Title 18, United States Code, Section 2312, reads as follows:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

III

QUESTIONS PRESENTED

1. Was there sufficient evidence at the trial below that appellant knew the vehicle was stolen and, knowing it was stolen, transported it in interstate commerce from California to Arizona?

2. Did the trial court abuse its discretion in permitting the Government to reopen its case-in-chief in order to receive the testimony of David Joseph Dimeglio?

IV

STATEMENT OF FACTS

On November 23, 1965, one Henry Mazarella was the owner of a 1966 white-on-blue Ford LTD hardtop, bearing temporary California license Number 0135849 and vehicle identification number 6J67Y101702. On November 23, 1965, Mazarella drove his car to his place of business at 7175 Willoughby Street in Los Angeles, where he parked the car in the adjoining parking lot at about 6:30 A. M., leaving the keys in the ignition. At about 9:30 A. M., on the same date Mazarella returned to the parking lot and discovered that his car was missing [R. T. 71]. 1/

Mazarella had not given anyone permission to drive his car on November 23, 1965. Nor was he acquainted with appellant or with David Joseph Dimeglio [R. T. 72]. Mazarella reported his car as stolen to the Los Angeles Police Department on the same day [R. T. 73].

At about 3:35 A. M., on November 24, 1965, two men drove into a Chevron Service Station at 449 East Hopson Way, Blythe, California. They were driving a 1966 Ford white-over-blue LTD automobile [R. T. 80]. The men ordered a full tank of gasoline. These men proceeded, at gunpoint, to order the service station attendant, Jim Gregory, to go to the station's restroom and remove his clothing, which he did [R. T. 85]. Through the

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1/ "R. T." refers to Reporter's Transcript.

open door of the restroom, Gregory saw the Ford heading north on the highway where the station was situated. Gregory then called the Blythe Police Department and reported what had happened [R. T. 88]. Prior to being held up by the men, Gregory had put 13-1/2 gallons of gas into the Ford [R. T. 89], which was not paid for.

At approximately 4:00 A. M., on November 24, 1965, Officer Glenn Richard Mackey of the Blythe Police Department was advised that an armed robbery had occurred at the Standard Station located in the 400 block of West Hopson Way in Blythe. Officer Mackey was further advised that the suspect vehicle, containing two armed white males, was proceeding along the main highway toward the Arizona border. The vehicle was described as a white-over-blue 1966 Ford LTD [R. T. 126]. Officer Mackey gave chase to the vehicle.

On Highway 60, about ten miles east of the Arizona border in Arizona, Officer Mackey spotted the described vehicle and, after a chase at speeds up to 100 miles per hour, succeeded in pulling over the vehicle [R. T. 128-129]. The two persons in the car turned out to be defendant and his codefendant, David Joseph Dimeglio [R. T. 130]. Dimeglio was the driver and appellant a passenger. These defendants were then arrested by Officer Mackey and advised of their constitutional rights. During a search of the car incident to the arrest two pistols were found, one under the driver's seat and another under the passenger's seat which had been occupied by appellant. Both guns were loaded [R. T. 131].

The license plates which were on the vehicle, California number GAN 474, had been stolen from a Mrs. Helen Finn [R. T. 144]. Also found during the search was a large cardboard box containing clothing which appellant identified as belonging to him [R. T. 133].

Appellant and Dimeglio had left Los Angeles in the stolen Ford at about 10:00 P. M., on November 23, 1965, planning to go to Georgia in the car. Dimeglio drove the first few miles, then appellant took over the driving until they reached Indio [R. T. 281-282]. All of the foregoing facts were brought out in the Government's case-in-chief.

At the trial, appellant took the stand and testified on his own behalf, to the following effect: That on November 21, 1965, he was released from the Los Angeles County Jail; that he then met codefendant Dimeglio, whom he had known previously, at a rooming house in Los Angeles; that Dimeglio on November 22, 1965, was not driving a car; that on the morning of November 23, 1965, he joined Dimeglio on a bus ride and walked with him around the streets of Hollywood; as they walked, Dimeglio told him to walk to the "end of the street," which he did; that Dimeglio then drove up to the corner of the street where he was waiting, driving a new 1966 Ford; that he did not ask Dimeglio where the car had come from; that after using the car on that day for a number of errands he and Dimeglio left Los Angeles on the night of November 23, 1965, for Georgia; that he drove to Indio from Los Angeles, and later Dimeglio drove to Blythe, where they stopped at the service station; and that they were apprehended on the highway in

Arizona [R. T. 164-184].

V

ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE BEFORE THE TRIAL COURT TO UPHOLD THE COURT'S FINDING THAT APPELLANT KNEW THE VEHICLE WAS STOLEN AND, KNOWING IT WAS STOLEN, TRANSPORTED IT IN INTERSTATE COMMERCE FROM CALIFORNIA TO ARIZONA.

Appellant contends that there was insufficient evidence of his knowing transportation of the stolen vehicle from California to Arizona, and that the trial court erred in refusing his motion for judgment of acquittal, made pursuant to Rule 28 of the Federal Rules of Criminal Procedure.

When the appellate courts consider an attack upon the sufficiency of the evidence on appeal, the general rule is that they must view the evidence at trial in the light most favorable to the Government.

Glasser v. United States, 315 U.S. 60 (1942);

Noto v. United States, 367 U.S. 290 (1961);

Stein v. United States, 327 F. 2d 825 (9 Cir. 1964), cert. denied 377 U.S. 970.

The evidence before the trial court showed that appellant was in the company of codefendant Dimeglio on November 23, 1965, at which time Dimeglio, who had previously been without a car,

suddenly turned up driving a 1966 brand new Ford [R. T. 173]. On the same night, appellant and Dimeglio left in the car for Georgia, and appellant drove the automobile from Los Angeles to Indio [R. T. 178, 281-282]. Before leaving Los Angeles, appellant bought about $5.00 worth of gas for the Ford at a Standard Station in Los Angeles [R. T. 218-219], and he also sold a tire which he found in the trunk of the stolen vehicle, at Dimeglio's request [R. T. 245-247]. Then, at the time Dimeglio and appellant were arrested in Arizona, appellant's clothing was found in the car [R. T. 133].

The elements which the Government was required to prove beyond a reasonable doubt at the trial below, in order to obtain and sustain appellant's conviction, were:

FIRST: The act or acts of transporting, or causing to be transported, in interstate commerce, a stolen motor vehicle; and

SECOND: Doing such act or acts willfully, and with knowledge that the motor vehicle had been stolen.

Sadler v. United States, 303 F. 2d 664 (10 Cir. 1962);
Gerber v. United States, 287 F. 2d 523 (10 Cir. 1961);
Ackerson v. United States, 185 F. 2d 485 (8 Cir. 1950);
Barfield v. United States, 229 F. 2d 936 (5 Cir. 1956).

Appellant in his brief does not appear seriously to question that the first necessary element was proved at trial. That the 1966 Ford in question was the same vehicle which had been stolen from

Mazarella, and that appellant drove it from Los Angeles to Indio, as well as that he sold a tire from the car and bought gas for it, were undisputed at the trial. It is well established that the act of transporting which must be shown does not have to be an actual, physical driving across the state line by the accused. It is sufficient for the Government to show any act of driving, whether within the state of origin or otherwise, which comprises a substantial step in furtherance of an intended interstate journey.

Barfield v. United States, 229 F. 2d 936 (5 Cir. 1956).

Such an act of driving was clearly shown in this case, in the testimony both of appellant and of Dimeglio.

We are left with the question whether appellant knew that the vehicle was stolen at the time he transported it.

It should be noted in connection with this question of guilty knowledge that appellant himself testified on direct examination, though not of course as a part of the Government case, that he had been walking around Hollywood with Dimeglio when Dimeglio told him to walk to the corner and wait for him, and that Dimeglio rejoined him with the stolen car within a few minutes. The trial court commented as follows: [R. T. 309-310]

> ". . . Mr. Roberts on the stand -- his testimony about how Dimeglio disappeared for five minutes and came back with what the evidence shows was a brand new car, had paper licenses on it, Roberts just stands up here and tells me that he didn't know anything about this car being stolen or that

he thought it belonged to Dimeglio, don't draw that inference.

"They were a long ways from Dimeglio's home and Dimeglio had not had a car and all of a sudden he shows up with a brand new car. Even if he had the money he couldn't have bought it in that length of time.

"There is no testimony they were in a garage or Dimeglio went to a garage, Ford garage to buy a new car. He hadn't had it before.

"I conclude that the evidence does establish beyond a reasonable doubt that the defendant is guilty as charged and I so find."

The foregoing establishes that the trial court was not satisfied with appellant's account of how he came to be in possession of the car (if he was in possession), and that in the court's opinion the circumstances of Dimeglio's coming into possession of the car placed his companion, appellant, on notice that it was stolen.

Knowledge of an accused that an automobile in his possession was stolen can be established by circumstantial evidence. Keyes v. United States, 314 F. 2d 119 (9 Cir. 1963). Such circumstantial evidence is found here in the appellant's sale of the stolen tire and buying of gas for the car, as well as in the holdup of the service station and theft of gas therefrom.

We are led to the question whether appellant had possession of the vehicle during the interstate journey, such that he may be inferred to have had knowledge that the vehicle was stolen.

In the case of United States v. Bennett, 356 F. 2d 500 (7 Cir. 1966), cert. denied 384 U.S. 975, the court held that the recent unexplained joint possession of a stolen motor vehicle by defendants who were found in the vehicle permitted an inference that they had stolen it and constituted sufficient evidence to support the jury's finding of guilty. This inference is a familiar one in Dyer Act cases.

See, United States v. Kolakowski, 314 F. 2d 699 (3 Cir. 1963);

Allison v. United States, 348 F. 2d 152, 153 (10 Cir. 1965);

Smith v. United States, 360 F. 2d 590 (5 Cir. 1960);

Luciano v. United States, 343 F. 2d 172 (4 Cir. 1965).

"Possession," in this context, means actual control, dominion or authority over the motor vehicle.

Allison v. United States, supra.

If the court below properly found that appellant, jointly with Dimeglio, had such possession, then it properly inferred therefrom the guilty knowledge of appellant. The Government submits that on the facts of this case appellant did control the vehicle to a sufficient degree. When appellant drove the car (a fact brought out by Dimeglio's testimony), bought gas for it, and sold the spare tire, he was clearly exercising dominion and control over it: the

court so found, and its finding should not be disturbed on appeal. Moreover, appellant's involvement in the robbery of the Standard Station in Blythe, the purpose of which was clearly to obtain gas and funds for the trip to Georgia, goes far to show appellant's willing taking of responsibility for the successful outcome of the trip in the stolen Ford.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE GOVERNMENT TO REOPEN ITS CASE-IN-CHIEF IN ORDER TO RECEIVE THE TESTIMONY OF DAVID JOSEPH DIMEGLIO.

The testimony of David Joseph Dimeglio, including his testimony that appellant drove the stolen vehicle from Los Angeles to Indio, California, was given pursuant to the trial court's permission for the Government to reopen its case after it had rested [R. T. 272]. Appellant assigns this permission to reopen as error, although in appellant's brief it is recognized that the reopening of a case lies in the discretion of the court [Appellant's Brief, p. 27].

The Government agrees that permission to reopen the Government's case may be given in the discretion of the trial court. We submit further that the reopening of the Government's case below involved a clearly proper exercise of that discretion.

It is well established that "whether a case may be reopened for further evidence rests in the sound discretion of the trial court and it will not be interfered with unless clearly abused."

United States v. Sheba Bracelets, Inc.,
248 F. 2d 134, 144 (2 Cir. 1957).

This principle has been many times reaffirmed. See, for example, Powell v. United States, 307 F. 2d 396 (D. C. Cir., 1962), cert. denied 377 U. S. 972.

Wolcher v. United States, 218 F. 2d 505 (9 Cir. 1955), cert. denied 350 U. S. 822;

Lucas v. United States, 343 F. 2d 1 (8 Cir. 1965);

United States v. Zeid, 281 F. 2d 825 (3 Cir. 1960).

Appellant does not here contend that he was surprised by the testimony of Dimeglio which was let in. Rather, appellant appears to argue that the Government should have been required to produce Dimeglio as a witness, if at all, prior to appellant's taking the stand. The case law does not support this contention. An instructive opinion in this regard is that of the Tenth Circuit Court of Appeals in Massey v. United States, 358 F. 2d 782 (10 Cir. 1966). Massey, like the case at bar, was an appeal from a conviction of Dyer Act violation. At trial, the court twice permitted the Government to reopen its case in order to put in sufficient evidence of the identity of the car which had been stolen and transported. There, as here, the appellant complained that the trial court had pointed out to the Government prosecutor the weaknesses of his case and in effect suggested that they be remedied. In affirming the conviction, the Court of Appeals stated:

"The appellant contends that the trial judge participated too actively in the conduct of the trial,

> especially in suggesting necessary proof to the prosecuting attorney . . . In this case, the trial judge suggested that a Pontiac dealer should be able to shed more light on the subject of identification, and the government, heeding the suggestions, produced a factory representative of the manufacturer as a rebuttal witness . . . The activity of the trial judge was not that of an advocate, but clearly was designed to get all the available facts fully and fairly before the jury. In so acting, he did not abuse its discretion."

The court in Massey also observed that testimony given after the reopening of the Government's case did not surprise the defendant or make necessary any further preparation. The same is the case here, although appellant states in his brief (at page 28), that "To the extent that the government held back the witness Dimeglio's testimony, the defendant was deprived of a true election as to how to proceed." But the fact is that appellant, following the close of the Government's case-in-chief during which Dimeglio did not testify, nevertheless took the stand and testified that he had driven the 1966 Ford from Los Angeles to Indio. This is the same testimony which Dimeglio later gave during the Government's reopened case, and it can hardly have come as a surprise to appellant at the later time. Appellant's defense was not prejudiced by this testimony except as it tended to show his possession of the stolen vehicle. Moreover, if appellant had been truly surprised by

Dimeglio's testimony, his counsel would undoubtedly have moved for a continuance: this he failed to do.

A Ninth Circuit case in accord with Massey is Haugen v. United States, 153 F. 2d 850 (9 Cir. 1946). There, in a prosecution for forging and uttering counterfeit obligations of the United States, a trial was had to the court. Thereafter the court, without making a finding of guilty or not guilty, filed an opinion wherein it observed that the Government had failed to establish that the obligations involved were obligations of the United States. The obligations were counterfeited meal tickets issued by a commissary and the Government had not proved that the commissary was an agency of the United States or that the counterfeiting of the tickets was calculated to defraud the United States. After the filing of this opinion, the Government was permitted to reopen its case in order to present evidence on these elements of the offense. The Court of Appeals found that the trial court had acted properly and within its discretion in permitting the Government to reopen its case. Just so, here, the trial court properly permitted the reopening of the Government's case in order to receive the testimony of Dimeglio relating to appellant's transportation of the stolen 1966 Ford.

Accord, Medina v. United States, 254 F. 2d 228 (9 Cir. 1958).

CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael Heuer
MICHAEL HEUER